FCC Open Internet Order Remand Request for Comments (GN Docket No. 14-28)

Submitted by: Scott Cleland, Chairman of NetCompetition, July 10, 2014

Reclassifying broadband as a Title II telephone utility service is a horrible idea that is un-supported by the facts; unjustified on the merits; and unwise given the FCC's seventy-year track record of Title II regulatory failures.

The FCC should carefully consider the overwhelming case against broadband reclassification summarized below, including the:

- Top ten facts that broadband is not a public utility service;
- Top ten reasons why broadband utility regulation is unjustified; and
- Top ten failures of FCC Title II utility regulation.

A. Top Ten Facts that Broadband is Not a Public Utility Service

1. **Physics:** The physics of broadband delivery facilitate competition while the physics of electricity, water and gas delivery facilitate monopoly. Electricity, water and gas can only be delivered in one basic physical manner unique to that service. In contrast, broadband can be delivered electrically over many kinds of metal wires, optically over fiber optic cables, and wirelessly in a wide variety of ways.
2. **Digital:** The simple binary ones and zeros of digital computer technology inherently enable many different technologies and physical mediums to interchangeability serve as broadband networks. Electricity, water and gas public utility networks are non-digital and inherently not interchangeable like broadband networks are.
3. **Economics:** Public utilities are based on single-use, high-capital-intensity, "natural monopoly" utility economics, where economies of scale and scope preclude the possibility of competitive facilities and services. Being digital, broadband provider facilities inherently have dramatically better economics because of multi-use-facilities, service bundles, rapidly declining digital equipment costs, and lower capital-cost intensity via wireless.
4. **Choice:** Public utilities exist for services where consumers have no alternative or choice. However, in broadband Internet access, the vast majority of Americans have a diversity of choices of broadband technologies, providers, services and features; i.e. free WiFi or pay-for-service via cable modem, DSL, fiber, wireless, or satellite. Consumers can also choose between stationary, mobile or hybrid access services and select from a wide variety of speed and price offerings.
5. **Competition:** As one of the top-advertised services in America, consumers know they can get broadband from their local cable company, local phone company, four national wireless broadband companies (Verizon, AT&T, Sprint, & T-Mobile), and two national satellite companies.

6. **Private Investment:** Private investors have invested $1.2 trillion of long-term risk capital in competitive broadband facilities in the U.S. over the last decade under the assumptions that broadband is a competitive service with growth potential and no prospect of utility regulation. This massive and unparalleled infrastructure investment is incontrovertible economic evidence broadband service is not a "natural monopoly," or likely to become one.
7. **Change:** Public utility services are characterized by standard uniformity and glacial rates of change. In contrast, competitive broadband services are characterized by diversity, differentiation, rapid-change, and continuous innovation.
8. **Speed:** Public utilities like electricity, water and gas, are designed to deliver a set and uniform delivery speed to everyone that is never expected to change. Competitive broadband networks are all about constantly improving the speed of delivery and offering the choice of differentiated speeds by price based on consumers' ever-changing needs, wants and means.
9. **Prioritization:** Public electricity, water and gas utilities deliver uniform unchanging service that requires only availability management. In contrast, competitive broadband providers deliver variable, constantly changing service that requires ongoing reasonable network management. Broadband providers must filter unwanted, harmful or illegal traffic like spam, viruses, malware, bot-nets, denial-of-service-attacks, and other intrusions and infections. In addition, reasonable network management is needed to address congestion, and to deliver quality-of-service to ensure different types of traffic enjoy the necessary real-time delivery – no latency, jitter or buffering – and minimal down time or packet loss.
10. **Common Carriage:** Utility "common carrier" regulation is an obsolete form of network regulation in the U.S., and the Public Switched Telephone Network (PSTN) is the last common carrier utility regulated network industry. Less than a quarter of Americans still use the PSTN exclusively and it is in the process of being transitioned out of service in the next few years. Congress ended common carrier regulation for railroads in 1976, for trucking and bus lines in 1980, and airlines in 1984.

B. Top Ten Reasons Why Broadband Utility Regulation is Unjustified

1. **A problem pretending to be a solution**: Net neutrality has long been "a solution in search of a problem." Well now net neutrality agitators' demands have become so extreme, that their latest proposed "solution" arguably has become the biggest problem threatening America's Internet's infrastructure and ecosystem.
2. **A trillion-dollar bait-and-switch:** The FCC effectively promised industry light-handed regulation to encourage $1.2 trillion in private-risk-capital, infrastructure investment over the last decade. If after the industry has invested, built out and respected the FCC's rules of the road, the FCC breaks that promise and imposes strictest regulation to address a largely hypothetical issue – that decision would become notorious as the "trillion-dollar bait-and-switch." Such an arbitrary and capricious FCC policy whipsaw would destroy an enormous amount of private capital and economic activity, and also prompt a tsunami of lawsuits and a decade of legal and regulatory chaos.

3. **All pain no gain:** It's hard to imagine a worst cost-benefit result than this. The FCC would be imposing maximal obsolete regulation to prevent a practically non-existent problem. All cost for no discernible benefit.
4. **Slow Internet to Government speed:** Title II regulation of broadband would abruptly decelerate the fast-speed of Internet business to the slow-speed of government. Title II decision-making is glacial, because it naturally slows to slowest part of the process. What could take hours or days to accomplish in business time could take several months or even years in FCC Title II time.
5. **Government-run Internet:** Title II is "Mother-may-I?" regulation. It would require every business decision of consequence to be approved by the FCC in advance -- i.e. changes in services, prices, terms, conditions, or infrastructure. Ironically, it would put the business Internet fast-lane in a government slow-lane littered with unnecessary regulatory speed bumps, potholes, stop lights, and inspection stations.
6. **Most obsolete regulation for most modern sector:** Congress ended common carrier regulation of railroads in 1976, trucking and bus-lines in 1980, and airlines in 1984. The common carrier Public Switched Telephone Network is obsolescing and being transitioned out of existence because it makes no sense to invest in it given its unworkable burden of a thousand obsolete common carrier regulations. Common carrier regulation of broadband would threaten the growth and productivity of the communications revolution of broadband, smart-phones, tablets and the Internet of things.
7. **No good deed goes unpunished:** For a decade, the broadband industry has respected, cooperated and agreed with FCC policy guidance that users should have the freedom to access the legal content of their choice on the Internet, even when the FCC did not have the legal authority to require it. Punishing responsible behavior is unjust, counterproductive and bad policy.
8. **Zero pricing is unsustainable:** The hidden sub-text lurking behind this issue is that Internet "edge" interests, including the largest Internet companies, want the FCC to set a permanent zero-price guarantee and economic subsidy for all downstream video Internet traffic sent to consumers. This regulatory arbitrage is economically unsustainable because it would unfairly force consumers to shoulder all the cost of upgrading the Internet infrastructure caused by the hugely-asymmetric, video-streaming traffic of the largest Internet companies. It's politically unsustainable because it would be unnecessary corporate welfare subsidies for the least needy.
9. **Only the fringe left wants it:** After a decade of vociferous political organizing to "Save the Internet" via net neutrality and common carrier regulation of broadband, fringe left-wing pressure groups have made minimal progress in convincing Americans at large. Despite pursuing an activist, media-centric, lobbying strategy, a recent Pew study exposed net neutrality as a relative non-issue to Americans. In the first four months of the year, less than 1% of news programs mentioned net neutrality and print coverage was limited largely to 6 newspapers.
10. **FCC overruling Congress:** Reclassification would have three unelected FCC officials effectively overruling the policy and will of Congress. It directly would contravene Congress' Internet policy statement in law: "*It is the policy of the United States… to preserve the… competitive free market… Internet… unfettered by Federal or State regulation."* It would also directly contravene the purpose of the FCC's 706 authority to "*encourage the deployment… of advanced telecommunications capability to all Americans*…" In addition, it would flout the House's Resolution of Disapproval of the

FCC Open Internet Order in 2011 and also ignore the 290 members of Congress who signed letters to the FCC opposing Title II reclassification in 2010.

C. Top Ten Failures of FCC Title II Utility Regulation

1. **Telephone service changed little in fifty years (1934-1984).** The mandated focus on providing the same telephone service universally to all Americans created a strong FCC aversion to anything new or different, e.g. wireless, digital, or other voice communication innovations.
2. **Achieving 94% telephone universal service took sixty years (1934-1994).** In just ten years of no broadband utility regulation overhang, 98% of Americans enjoy availability of broadband service and most all enjoy broadband service availability from multiple broadband technologies.
3. **Commercial availability of mobile phone service took ~thirty-five years (1947-1982).** AT&T first offered a mobile telephony service in 1946. Bell Labs invented cell-phone networking in 1947. AT&T requested mobile spectrum for mobile telephony in 1947 and 1968. Not until 1982 did the FCC approve commercial mobile phone service. Japan first commercialized mobile phone service in 1979.
4. **Commercial availability of data service took ~forty years (mid-1950s-mid-1990s).** Bell Labs invented the computer modem for the U.S. military in the mid-1950s. 56k dial-up computer modems were not broadly commercially available until late-1990s, and broadband modems were not until after 2000.
5. **Commercial availability of Internet access took ~twenty years (1969-early-1990s).** While U.S. military researchers invented the original Internet in 1969, this packet-switching technology was used primarily by researchers until the National Science Foundation commercialized the Internet backbone in the early 1990s, and until public use was allowed in 1995.
6. **The DOJ sued FCC-Title-II-regulated-AT&T for illegal monopolization.** FCC Title II common carrier regulation proved hostile to competition triggering the DOJ to sue AT&T in 1977 for monopolization. In 1984 a Federal Court settlement broke up the company.
7. **The DOJ/Court largely replaced the FCC as telephone regulator from 1984-1992.** Judge Harold Greene, not the FCC, made most all major telephone regulatory decisions to promote telephone services competition.
8. **FCC Title II regulation delayed telephone competition legislation ~twenty years.** Since the FCC's Title II regulation required the DOJ to intervene in the sector in 1977, telephone service became the only U.S. common-carrier-regulated service to not be deregulated and replaced with competition policy in the 1970's and 1980's. The need for DOJ/court involvement then also gave the House and Senate Judiciary Committees jurisdiction over telecommunications in addition to the normal Congressional committees, which further complicated and delayed passage of the ultimate Telecom Act by several years. Meanwhile, Congress deregulated all other common carrier regulated industries: railroads in 1976; trucking and bus-lines in 1980; and airlines in 1984.
9. **The FCC's Telecom Act implementation bankrupted the entire CLEC industry.** The FCC's attempt to regulate virtually every aspect of local phone competition to regulatorily advantage competitors and

disadvantage incumbents resulted in huge regulatory arbitrage, uneconomic CLEC business models, and an unsustainable industry that could not exist without enormous FCC price subsidies. When capital dried up when the tech bubble burst in 2001 and the CLECs regulation-dependent models were exposed, the entire CLEC industry quickly went bankrupt.

10. **The FCC's Title II excesses delayed sustainable facility-based competition for several years.** The FCC's Title II implementation of the 1996 Telecom Act aggressively favored resale competition over facilities-based competition. In particular, the FCC imagined it could bypass Congress' mandated ~15-20% wholesale resale discount for incumbents' local phone services, with an aggressively creative Unbundled Network Element Platform (UNEP) scheme that could generate as much as a 50-60% wholesale discount. After seven years of court cases and appeals, the FCC's huge "UNE-P" Title II legal gambit was overturned as illegal. The de facto market result was an artificial and illegal multi-hundred billion dollar misdirection of capital toward FCC-favored, economically-unsustainable resale models and away from economically-sustainable facilities-based competition models that would require minimal FCC oversight.

In sum, the FCC should summarily reject calls to reclassify broadband as a Title II telephone utility service as: unsupported by the facts; unjustified on the merits; and unwise, given the FCC's hard-to-deny, seventy-year, track record of Title II regulatory failures.

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